# Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1262.

WM. P. MARROW AND WIFE AND OTHERS

vs.

JOSEPH B. BRINKLEY AND OTHERS.

## Motion to Dismiss Writ of Error for want of jurisdiction, and accompanying Brief.

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IN THE

# Supreme Court of the United States.

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WM. P. MARROW AND WIFE AND OTHERS

VS.

JOSEPH P. BRINKLEY AND OTHERS.

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## MOTION.

Joseph B. Brinkley and others, the Defendants in error, by their counsel, respectfully move the Court to dismiss the writ of error in this cause, for want of jurisdiction in the Court; and they refer to the accompanying brief for a statement of the facts, and of the grounds upon which their motion is based.

ALFRED P. THOM,
THOMAS TABB,
RICHARD WALKE,
} *Counsel for Defendants in Error.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1888.—No. 1,262.

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WM. P. MARROW AND WIFE AND OTHERS

*versus*

JOSEPH B. BRINKLEY AND OTHERS.

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BRIEF OF DEFENDANTS IN ERROR ON THEIR MOTION TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

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The plaintiffs in error, who were the plaintiffs in the lower State Court and plaintiffs in error in the Supreme Court of Appeals of Virginia, filed their bill in chancery in this cause in the Circuit Court of Warwick County, Virginia, in 1886, for the purpose of setting aside two decrees, which had been entered respectively on May 4th, 1871, and May 4th, 1872, by the Circuit Court of Elizabeth City County, Virginia, in the consolidated chancery causes of Brinkley vs. Latimer and West and others, Peek vs. West and others, and Willis vs. Latimer; and for the purpose of annulling and setting aside deeds which had been made in said causes for certain pieces or tracts of land at or near Newports News, Virginia; the de-

fendants in error in this cause, or most of them, being the parties to whom said deeds were made, or claiming title under such parties. This suit was an effort to annul the previous suits, from which no appeal had been taken. Reference is hereby made to the bill in this cause (page 23 of record) and to the prayer of the bill (page 32 of record.)

The object of the consolidated suits had been to subject the lands of one Parker West to the claims of his creditors; Brinkley, the plaintiff in the first suit, having obtained judgment against him on his claim in 1861. Parker West had been the owner of lands in Elizabeth City County, some of which he still owned and was in the possession of; other of his lands had been sold during the war under the confiscation act of July 17th, 1862. The effect of the ruling of the Court in the consolidated suits was also to subject this latter land, after the death of Parker West and the termination of the estate held by the purchasers at the confiscation sale, to the debts of Parker West. The property in controversy in this suit is a part of this latter land.

The decree of May 4th, 1872, in the consolidated causes is, as follows:

"*Decree May 4th*, 1872.

| BRINKLEY, &c., | WILLIS, &c., | PEEK |
|---|---|---|
| *vs.* | *vs.* | *vs.* |
| LATIMER, &c. | LATIMER. | WEST. |

*In Chancery.*

The death of Parker West being suggested, on the motion of William P. Marrow and Mary E., his wife, Elizabeth R R. West, George B. West, and M. Smith and Missouri his wife

—the said Mary E Marrow, Elizabeth R. West, G. B. West, and Missouri Smith being the heirs at law of the said Parker West—to be made parties defendant to these causes, the said William P. Marrow and M. E. his wife, E. R. West, G. B. West, and M. Smith and Missouri his wife are hereby made parties defendants to these causes with leave to file their answers.

This cause then this day again came on to be heard on the papers formerly read and on the report of Special Commissioners C. K. Mallory, Thomas Tabb, and G. M. Peek of the sales made by them under a former decree in these causes, to which report no exceptions have been filed, and was argued by counsel.

On consideration whereof the Court doth adjudge, order and decree that the said report and the sales reported therein be, and the same are hereby, confirmed.

And the Court doth further adjudge, order and decree that (the rest of the decree it is not necessary to set out)."

The principal portion of the land in controversy in this suit (viz., that of the defendants in error, John B. Whitehead and John S. Tucker,) was sold to them after this decree; that is, the sale was made by the Special Commissioners as well as confirmed by the Court after the decree, it being reported to the Court by the Special Commissioners' report of October 1st, 1872, and confirmed by the decree of October 2nd, 1872, (pages 95 and 96 of record). The sale of the rest of the land in controversy in this suit was confirmed by the decree of May 4th, 1872. These facts are stated as a part of the history of the original causes, though not necessary for the defendants' case.

It will be seen from the said decree, that Parker West was

dead, and that the plaintiffs in error were made parties to the said consolidated causes.

What now is the question before this Court which gives it jurisdiction of this pending cause? In the petition for a writ of error it is claimed that there was drawn in question "a right, title, privilege and immunity to real estate, arising from the construction of the Act of the Congress of the United States, approved July 17th, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes, and the joint resolution passed concurrently therewith,' and that the decision was against the right, title, privilege and immunity claimed under the said statute." We deny that there was any decision in this cause in regard to the effect of the confiscation act or the resolution concurrent therewith. It was not necessary for the purposes of the case; and none such was rendered. That question was involved in the consolidated causes brought in 1870, but was not involved in this cause. The question involved in this cause was whether the plaintiffs in error were made parties to the consolidated causes under the decree of May 4th, 1872; whether that decree was conclusive upon them as to that point; and whether, even if not so conclusive, their laches had not been such as to estop them from any relief against purchasers for value in those suits; and whether purchasers for value were not entitled to be protected against the claims set up by them. If these issues were decided against the plaintiffs in error, then there was no occasion for passing upon the decision of the Court in the other causes. In fact, the decision of the Court in the other causes certainly could not be before the Court in this cause, unless it

were held that the plaintifis in error were not parties to the other causes under the decree of May 4th, 1872; and even then, the whole question of estoppel of the plaintiffs in error, and of due and proper diligence in asserting their claim, and of protection to purchasers for value under judicial sales, would come up, before this question of the effect of the confiscation act could be claimed to be before the Court in this cause.

All this is clearly shown by the record, from the beginning to the end; and the Court never went into the consideration of the effect of the confiscation act.

The bill necessarily has to refer, and does refer, to the original causes, in seeking to annul them and the decrees entered in them. In paragraph 5 of the bill, the plaintiffs in error say, "That the said Circuit Court of Elizabeth City County had no power or jurisdiction to decree a sale of the said tract of land and vest in the purchaser a fee simple title, unless they were parties to the said suit, &c;" and in paragraph 7, after reciting the decree of May 4th, 1872, making them parties, they seek to destroy its effect, and allege, "That at the time the said decree was entered they had no knowledge whatever of its contents; that they had not employed counsel to represent them in the said suits; and that they never authorized any attorney-at-law or any other person to act for them in the said suits, and, as no process was ever served upon them requiring them to appear in said suits and defend their rights, they did not suppose any decree could be entered affecting their rights." Again, in paragraph 8 they allege, "That the recitals in the said decree of May 4th, 1872, mentioned in the foregoing paragraph of this bill, are false; that no one of the parties named

ever appeared in the said Court in person and made the said motion; that on the day named no one of them was in the town of Hampton; that no one of them ever employed an attorney-at-law to represent them in the said causes, to make the said motion, or to protect their rights as heirs of Parker West, nor did all of them or a part of them ever do any of the acts enumerated." Again, in paragraph 12 they allege, "That no process was ever served upon them in the said consolidated causes prior to the said decrees of May, 1871, and May 4th, 1872, or since that time, and the recitals in the latter decree as to their appearance being false; that the said Court at no time in the said proceedings, had any jurisdiction over the persons of the plaintiffs, in whom, after the death of Parker West, the fee-simple title to said lands known as the Newport News tract vested, and in whom, before his death, the reversion vested, and they claim that the decrees authorizing the sale of said lands, the decrees confirming said sales and directing deeds to be made to the defendants, Groome, Kimberly, McDevitt and Whitehead, and the said deeds are absolutely void for want of jurisdiction in the said Court of Elizabeth City County over the plaintiffs, the heirs-at-law of Parker West, yet they are clouds upon their title and obstruct their proceedings at law to obtain possession of said lands."

The prayer of the bill has already been referred to (see page 32 of record). It is plain, therefore, what the character of this suit is, and what the issues involved.

Let us look at the answers in the cause, which are all substantially alike. The seventh paragraph of the answer of John S. Tucker (page 214 of the record) is as follows:

"VII. This respondent admits that on the 4th day of May, 1872, the first term of the Circuit Court of Elizabeth City County after the death of Parker West, a decree was entered in the said consolidated causes, beginning as alleged in said bill. This respondent has no personal knowledge as to the truth of the recitals of the said decree; but he is informed that Charles K. Mallory, a lawyer of the highest standing, did represent the plaintiffs, causing them to be made parties by the said decree, and that said Charles K. Mallory is now dead and has been dead for many years."

"This respondent further alleges that the said John B. Whitehead (to whom alone the deed was made for the 20½ acres bought by him and this respondent, and who has since conveyed to this respondent an undivided one-half interest in the same as hereinafter shown), as well as this respondent, were purchasers from the Special Commissioners in said consolidated causes, and purchased under a decree in said causes more than six months after the date of said decree, and that said sale was confirmed; that they purchased with full confidence in and upon the faith and credit of the recitals and statements of said decree and said record; that they had never heard any question raised as to the truth of the said recitals and statements, or any suggestion that the plaintiffs were not in fact parties to the said proceedings; and this respondent is advised that it was not incumbent upon them to look behind the said decree and record, and that they had the right to rely fully upon the truth and accuracy of the same. And this respondent is advised, that being as aforesaid purchasers for value of said property, and without notice of any infirmity in the proceedings in said causes or of any want of verity in the recitals, statements and findings of the said decree of May 4th,

1872, they are now and have been at all times since their said purchase was confirmed by the Court, absolutely protected by the said record, and no assault can be made thereon by any person, who appears upon said record to have been a party thereto, which can affect their interests as such purchasers. And this respondent further says, that even if the pretensions of the said plaintiffs as to the truth of the recitals and statements of the said decree were founded in fact, the plaintiffs as above stated, were thoroughly cognizant of the fact, that the proceedings were pending, under which the said John B. Whitehead and this respondent purchased the land in question, and that the object of said proceedings was to sell the said land; that they stood by in silence and allowed the said purchase to be made without any intimation of any claim whatsoever on their part; and that on the contrary, as before stated, as early as April, 1872, they recognized the validity of the said proceedings and sales and conveyed their interest in the proceeds of sale of the said land as security for a debt they desired to secure. And this respondent further alleges, that the said plaintiffs lived together in the same dwelling at or near Newport's News; that the said George B. West, one of them, was a party defendant in a fiduciary capacity in the said consolidated causes from the very inception thereof, and purchased some of the very Newport's News land sold in said causes under decrees in said causes; and that all of the plaintiffs had the same knowledge and information that the said George B. West had."

"And this respondent further says, that the said John B. Whitehead and this respondent would not have purchased, had they known of any adverse claims asserted against the property, and circumstances and the situation of the parties have greatly changed in the intervening period. The said Charles

K. Mallory, the attorney who represented the heirs of the said Parker West (now plaintiffs in this suit) in the said proceedings, but whose employment and authority they now deny, has since died; the materials for the investigation asked for by the plaintiffs are not now in existence; and no such investigation can be had with due regard to the rights of purchasers who relied with implicit confidence upon the solemn assurance of the Court by its record; and this respondent submits, that the plaintiffs, having slept upon their pretended rights for a period of fourteen years, are now estopped from setting up any such claims. And this respondent alleges, that it was the duty of the said plaintiffs, and the legal obligation rested upon them, as against innocent purchasers for value at judicial sales, to have asserted their claims to the said land, if any such they had, with diligence and promptness; and that having failed so to do, the rights of this respondent as an innocent purchaser for value at a judicial sale, cannot be now affected by any claims set up by them."

The opinion of the Court of Appeals of Virginia is also specially referred to. It would be useless repetition to set out in full that opinion again; it is a part of the record (see page 230). But we call the attention of the Court specially to it; and it will be seen that the Confiscation Act, or its effect, was not considered by the Court. Its opinion was rendered entirely upon the issues we have referred to.

The Court, after stating the case at great length, commences the discussion of these issues. It will be seen that it decides, using its own language, that, "Pending the said suits (consolidated) Parker West died, in December, 1871, and his heirs at law were made parties defendant to the causes May 4th, 1872, by an order of the Court reciting that the death of Parker West was suggested, and that his heirs at law, the appellants here, were by name upon their own motion and ap-

pearance made parties defendant and given leave to answer." "It appears," following the language of the Court, "by the very record and the solemn recital of the decree complained of, that at the time of the rendition of the decree, May 4th, 1872, under which the appellees purchased, and to annul which is the object of this suit, they the appellants, were before the Court, &c."

Again: "The appellees were bona fide purchasers from a Court of competent jurisdiction, at a judicial sale, for value, without notice of any of the matters extrinsic to the record, relied on now by the appellants to support their claim; and as such they have the right to rely absolutely upon the verity of the record as to facts extrinsic to the record. and of which they had no notice, even assuming the existence of those facts dehors the record. The decisions of the courts, as a system of equity, founded upon an enlightened public policy to give sanction to judicial sales, and security and repose to judicial titles, establish the rule that a purchaser at a judicial sale, without notice, under proceedings regular upon the face of the record of a Court of competent jurisdiction, will be protected as against the mere errors of the Court, and secret vices in the proceedings, which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. To admit a party to a suit, the record of which solemnly vouches him to be such, to recover against a purchaser at a judicial sale, made under that record, by swearing that no service was actually made on him, and that there was no authorized appearance for him, as in this case, many years after the event, and after the death of the officers of the Court, and the distinguished and honorable counsel, who had knowledge and could prove the facts vouched in the record of the proceedings, would open the door most invitingly to perjury, injustice, and fraud; destroy all confidence in and efficiency of judicial sales; unsettle titles; and produce untold misery, mischief, and confusion throughout the Commonwealth."

The opinion also discusses the question of estoppel, and of the diligence required, as against purchasers for value at judicial sales, even admitting that the decree could be attacked; and it uses the following language:

"But the evidence in the record, outside of the recital of the fact in the decree itself, is clear and abundant that these heirs knew of the pendency of the suits, and all the proceedings therein, and the object thereof; that Col. Mallory, who is dead, represented their father in these suits to sell his lands, and they did not revoke or question his authority after the death of Parker West, pending the suits, and before the sales were decreed and made and reported to and confirmed by the Court; nor did they ever take any manner of exception whatever to the act of the Court in selling these lands; and the authority of Col. Mallory must be presumed."

Again: "The record shows that these appellants knew all the time all the material facts with reference to the sale of these lands by the Circuit Court of Elizabeth City county, as far back as 1872, to pay their father's debts. They resided, all but one, upon a part of the very tract which was subdivided and sold to these appellees, which parcel G. B West, one of the heirs and appellants, had bought in these suits; and the evidence is clear that Marrow, the one residing in Richmond, knew all the proceedings. They had daily evidence before their eyes of the possession by the appellees of the property which they knew had been sold to them. They resided, all of them except Marrow, within a few miles of the residence of the attorney who they knew had been the trusted representative of their father, and who had continued, after his death, to represent them in the suits and the sale of the lands; and they were in daily intercourse with the purchasers who they knew had bought and resold these lands to others for value and without notice, &c."

Such was the decision of the Appellate Court of the State in this case; and the grounds upon which it was based, were

the unimpeachability of the record in the consolidated causes, and the estoppel of the plaintiffs in error.

The plaintiffs in error themselves, in their petition for a rehearing addressed to the Supreme Court of Appeals of Virginia (see record, page 219) concede the grounds upon which the opinion of that Court was based. Their petition states, as follows:

"1. That on the 17th day of May, 1888, in the above entitled cause a decree was entered simply affirming the decree of the lower Court entered on the 26th day of October, 1886, dismissing the bill of the plaintiffs' below, for reasons stated in the opinion of the Court.

2. The reasons stated are based upon the equitable doctrine of *estoppel in pais*, and innocent purchaser for value, without notice, the language of the opinion on these points being as follows:

a. "Having kept a sinister silence when they should have spoken with candor and courage, equity now closes her door and leaves them to obtain from a court of law what they can."

b. "That as against an innocent purchaser for value, without notice, a court of equity is without jurisdiction and will refuse to give any assistance whatever, leaving the party to enforce his technical rights at law."

The decree entered by the Court dismissing the bill is likewise referred to (see Record, page 219), and is in the following words:

"This day came again the parties by their counsel, and the Court having maturely considered the transcript of the record of the decree aforesaid, and the arguments by counsel, is of opinion for reasons stated in writing and filed with the record, that there is no error in the said decree. It is therefore decreed and ordered that the same be affirmed and that the appellants pay to the appellees thirty dollars damages, and also their costs by them about their defence herein expended.

Which is ordered to be certified to the said Circuit Court of the county of Elizabeth City."

The decree of the Lower Court, referred to in the foregoing decree, was one dismissing the plaintiffs' bill, and is found on page 209 of the Record.

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As to the law of this case upon the subject of a federal question being involved, and the essentials required to give jurisdiction, it is almost a work of supererogation to discuss it before this Court. It has been decided so often that no room is left for doubt.

It was incumbent upon the plaintiffs in error to show by the record, that the decision of a federal question was necessary for the determination of this case, and that the case was actually decided upon such federal question, or that the decree could not otherwise have been rendered. Here the facts are all against the plaintiffs in error as is clearly shown by the record, and especially by the opinion of the Court.

127 U. S. R., De Saussure vs. Gaillard, 226-234.

"It has been repeatedly decided, under section 709 of the Revised Statutes, that to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it;" referring to a number of decisions. See page 234.

Again: "It is a well settled rule, limiting the jurisdiction of this Court in such cases, that "where it appears by the record that the judgment of the State Court might have been based either upon a law which would raise a question of repugnancy to the Constitution laws, or treaties of the United States, or upon some other independent ground; and it appears that the Court did, in fact, base its judgment upon such independent ground and not on the law raising the federal question, this Court will not take jurisdiction of the case, even though it might think the position of the State Court an unsound one." Klinger vs, Missouri, 13 Wall., 257-263, per Mr. Justice Bradley. See pages 233-4.

111 U. S. R., Chouteau vs. Gibson, 200, 201.

"From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest Court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case. Murdock vs. Memphis, 20 Wall., 590, 636."

Again: "Such being the case, it is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which the decision of the State Court is not reviewable here. The federal questions, if any there were in the case, lay behind this defence, and could not be reached until it was out of the way. The question presented by the defence was not whether a federal right had been properly denied by a former judgment, but whether the right had been once judicially determined so as to become res judicata between the parties."

114 U. S. R., Detroit Railway Co. vs. Guthard, 133, 136.

After citing the above language from Chouteau vs. Gibson:

"The reason of this rule is obvious. Our jurisdiction for the review of a judgment of the highest Court of a State depends on the decision by that court of one or more of the questions specified in section 709 Rev. Stat., and in the way there mentioned. If there has been no such decision in the suit, there can be no re-examination of the judgment here. It is what was actnally decided that we are to consider, not what might have been decided; and, as our jurisdiction must appear affirmatively on the face of the record before we can proceed, the record must show either in express terms or by fair implication, not only the question, but its decision. It is not enough to find by searching after judgment, that the requisite question might have been raised and presented for decision. It must appear that it was actnally raised and actually decided. Brown vs. Colorado, 106 U. S, 95, 97."

20 Wall., Murdock vs. Memphis, 590-1, 635-6.

"Finally, we hold the following propositions on this subject as flowing from the statute, as it now stands:"

"1. That it is essential to the jurisdiction of this Court over the judgment of a State Court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State Court."

"2. That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case."

"3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States."

"4. These things appearing, this Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State Court."

"5. If it finds that it was rightly decided, the judgment must be affirmed."

"6. If it was erroneously decided against the plaintiff in error, then this Court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that Court, notwithstanding the error in deciding the issue raised by the federal question If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."

"7. But if it be found that the issue raised by the question of federal law is of such controlling character, that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that Court without regard to the federal question, then this Court will reverse the judgment of the State Court, and will either render such judgment here as the State Court should have rendered, or remand the case to that Court, as the circumstances of the case may require."

125 U. S. R., N. O. Water Works vs La. S. R. Co., 18.
123 U. S. R., Chapman vs. Goodnow, 541, 548.
115 U. S. R., Jacks vs. Helena, 288.
112 U. S. R., Adams Co. vs. B. & M. R. R., 123, 127.
110 U. S. R., Jenkins vs. Lowenthal, 222.
98 U. S. R., Citizens Bank vs. Board of Liquidation, 140.
92 U. S. R., Brown vs. Atwell, 327.

And many others unnecessary to be cited.

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*December 3d*, 1888.